

SECTION ES.

Executive Summary

The Idaho Transportation Department (ITD) must implement the Federal Disadvantaged Business Enterprise (DBE) Program in order to receive U.S. Department of Transportation (USDOT) funds. Recent legal decisions and guidance from USDOT have led ITD to reexamine how it implements the Program. ITD retained BBC Research & Consulting (BBC) to conduct a Disparity Study to assist the Department in its implementation of the Federal DBE Program.

Study Overview

This Disparity Study examines the transportation construction and engineering industry in Idaho and related contracts awarded by ITD. The Study focuses on Federal Highway Administration (FHWA)- and state-funded contracts, but also makes recommendations concerning implementation of the Federal DBE Program for Federal Transit Administration (FTA)- and Federal Aviation Administration (FAA)-funded contracts.

BBC examined more than 4,500 construction and engineering contracts and subcontracts from 2002 through 2006. To examine relative availability of minority- and women-owned firms for this work, BBC completed telephone interviews with more than 3,000 business establishments potentially involved in the local transportation contracting industry. The study team reviewed thousands of bids and proposals submitted for construction and engineering contracts. In addition, the study team conducted in-depth interviews with firm owners and trade association representatives across the state. BBC also examined public hearing testimony and written comments received after publication of a preliminary disparity study report.

This summary discusses:

- Data concerning the overall annual goal for DBE participation in federally-funded contracts;
- Information on how much of the annual goal can be achieved through neutral means; and
- Specific measures ITD should consider to implement the program.

Overall Annual DBE Goal

ITD must develop an overall goal for DBE participation whether or not it implements race- or gender-conscious programs or only neutral programs. The Federal DBE Program calls for a “base figure analysis” and consideration of any “step 2” adjustments in deriving an overall annual goal for DBE participation in federally-funded contracts.

Base figure analysis. After considering type, contract role, location and size of work involved in federally-funded projects, and the relative availability of firms to perform that work, BBC determined that 15.3 percent of dollars on federally-funded contracts would be expected to go to minority- and women-owned firms (MBE/WBEs) if available MBE/WBEs received the same amount of work as similarly situated majority-owned firms. However, some of the largest MBE/WBEs would not meet the federal eligibility requirements for DBE certification. After removing these firms from the set of

potentially DBE-certified firms, the revised analysis indicates a base figure of 10.5 percent DBE participation.

Step 2 adjustments. ITD could consider adjustments in the base figure through a “step 2” process. This process considers whether or not there is any indication that, but for discrimination, current availability of DBEs might be higher and therefore warrant a higher overall DBE goal. The step 2 process also reviews any information suggesting that the base figure for the overall DBE goal might be too high. Relevant types of information to be considered in making a step 2 adjustment are outlined in the Federal DBE Program. BBC’s review of the information suggests that any factors indicating downward adjustments in the base figure would be offset by factors indicating upward adjustments in the base figure.

Percentage of the Annual Goal to be Achieved through Neutral Means

The Federal DBE Program requires ITD to assess the percentage of its overall annual DBE goal that can be achieved through neutral means, and if necessary, the percentage to be achieved through race- and gender-conscious measures.

Evidence of disparities when ITD implements an all-neutral program. To help ITD make decisions on the extent to which it can implement the DBE Program solely through neutral means, BBC examined utilization of minority- and women-owned firms on past ITD contracts with and without DBE contract goals. The “without-goals” contracts include all state-funded contracts as ITD has not implemented any race- or gender-conscious measures for non-federally-funded projects. They also include federally-funded contracts awarded after January 2006, when ITD discontinued setting DBE contract goals on these contracts.

Federally-funded contracts. From 2002 through 2006, minority- and women-owned firms (including firms not DBE certified) were awarded 13.1 percent of prime contract and subcontract dollars for federally-funded transportation construction and engineering contracts. This level of MBE/WBE utilization fell slightly below what would be expected based on overall analysis of MBE/WBEs available to perform that work (15.3 percent). However, about 12 percent of federally-funded contract dollars went to women-owned firms and 1 percent went to minority-owned firms. There were substantial disparities between utilization and availability for minority-owned firms (for each race/ethnic group) even for the time period with DBE contract goals in place.

When BBC examined only those federally-funded contracts after January 2006, MBE/WBE utilization was only 10.8 percent of contract dollars. This was substantially below the utilization expected based on MBE/WBE availability for these contracts and subcontracts.

State-funded contracts. MBE/WBE utilization on state-funded contracts from 2002 through 2006 was 14.6 percent, less than what would be expected based on MBE/WBE availability for these contracts (about 20 percent).

Results for subcontracting versus prime contracts. In general, BBC found that minority- and women-owned firms received a relatively large share of subcontract dollars on construction contracts whether or not DBE goals were in place. With DBE goals, MBE/WBEs received one-quarter of construction subcontract dollars. Without DBE goals, minority- and women-owned firms obtained nearly one-third of this work. However, most of the subcontract volume went to white women-

owned firms. There were disparities between actual utilization of minority-owned firms and what would be expected given MBE availability for these subcontracts.

For engineering-related subcontracts, utilization of minority- and women-owned firms was substantially below availability for these subcontracts.

BBC identified the largest disparities for construction and engineering prime contracts, even when just examining smaller contracts. The past DBE contract goals program focused on opening opportunities for subcontractors, not prime contractors.

Qualitative information. The study team collected and reviewed qualitative information from in-depth personal interviews conducted with minority-, women- and majority-owned firms across the state, from interviews with trade association representatives, and from open-ended questions included in a large survey of local firms. There were some instances in which minority and female business owners reported that they were treated differently because of their race or gender. Many minority and female business owners identified disadvantages that were not directly related to race or gender of the firm owner.

Remedies available to ITD. As described below, ITD has a number of race- and gender-neutral remedies that can address identified barriers to minority- and women-owned firms.

ITD Implementation of the Federal DBE Program

The Federal DBE Program requires ITD to meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation. However, some targeted efforts toward DBEs may be needed in the future.

General technical assistance. ITD should continue efforts to build capabilities of minority- and women-owned firms. BBC recommends multiple tiers of assistance depending upon the age, size, line of work and other business factors to make assistance most useful for firms in different stages of development. Specialized assistance to reservation-based Native American-owned firms may be needed.

Construction subcontracting. BBC does not recommend reintroduction of the DBE contract goals program for construction contracts at this time. However, ITD should not only monitor DBE and MBE/WBE utilization as subcontractors on both federally- and state-funded projects, but it should also track MBE/WBE utilization for the individual prime contractors obtaining a large dollar volume of ITD construction contracts. If needed, ITD can further investigate whether there are particular barriers for minority- and women-owned subcontractors seeking work from individual prime contractors. ITD has the authority to ensure that its prime contractors are not discriminating against potential subcontractors based on subcontractors' race, ethnicity or gender. ITD should consider holding mandatory pre-bid conferences for certain contracts as a forum to introduce subcontractors to primes. ITD should automatically inform first-tier subcontractors of ITD payment to prime contractors.

Without DBE project goals, there is some potential for prime contractors to self-perform work they previously subcontracted. ITD could consider setting minimum percentages for work to be subcontracted on a project if self-performance negatively affects opportunities for small subcontractors, or minority- and women-owned firms.

Construction prime contracts. Even though BBC’s analysis found that ITD already has many small construction contracts (and that disparities in MBE/WBE utilization remain on small contracts), ITD should attempt to further unbundle its large contracts to encourage bidding by smaller MBE/WBEs.

ITD should consider identifying a limited number of construction projects as joint venture “demonstration projects” for larger contractors teaming with small, emerging prime contractors. Bidding would be limited to joint venture partners. ITD can also encourage additional mentor-protégé efforts by Associated General Contractors, other associations and individual prime contractors.

Technical assistance and other efforts to build strong MBE/WBE prime contractors will be needed for many years in order to address the disparities identified in MBE/WBE participation as construction prime contractors. ITD should closely monitor MBE/WBE bidding and contract awards to gauge the success of these efforts, and assess whether stronger programs are needed in the future.

Engineering contracts. BBC does not recommend reintroduction of the DBE contract goals program for engineering contracts at this time. ITD should consider the following program elements related to its engineering contracts:

- Develop systems to better identify and communicate ITD engineering opportunities;
- Require prime consultants competing for certain term agreement categories to include subconsultants as part of a team submission (and encouraging DBE participation among subconsultants);
- Periodically hold mandatory pre-proposal conferences where subconsultants can introduce themselves to prime consultants;
- On certain RFPs, set minimum percentages of work that prime consultants must joint venture or subcontract out and encourage use of small businesses on these joint ventures and subcontracts;
- Monitor individual prime consultants’ use of minority- and women-owned subconsultants on ITD work and further investigate certain prime consultants when warranted;
- Provide intensive technical assistance to encourage proposals for term agreements from minority- and women-owned firms and work with MBE/WBE firms to improve the quality of their proposals;
- In the scoring of proposals for term agreements, award points for firms that have not been successful in competing for a type of work (or term agreement category) in the past but have a proven track record as a subconsultant; and
- Automatically inform first tier subconsultants when prime consultants have been paid.

ITD should consider this information in determining whether any portion of the overall annual goal for the next fiscal year should be achieved through race- or gender-conscious means.

Tracking MBE/WBE as well as DBE utilization. ITD needs additional metrics to track success beyond those suggested in the Federal DBE Program, including careful tracking of MBE/WBEs (not just DBE participation) in both federally-funded and state-funded contracts. For example, one measure of ITD's success should be the number of minority- and women-owned firms that grow too large to be eligible for DBE certification. These steps are critical for ITD to be in compliance with the Federal DBE Program and ensure that it is not an active or passive participant in race or gender discrimination against minority- and women-owned firms.

Conclusions

Analysis of ITD prime contracts and subcontracts, and the availability of minority- and women-owned firms to perform this work, suggests a base figure for an overall DBE goal of 10.5 percent. ITD must implement the Federal DBE Program, and set an overall DBE goal, whether or not it operates any race- or gender-conscious programs such as DBE contract goals.

BBC identified disparities between utilization and availability of minority- and women-owned firms on ITD contracts, especially as prime contractors. ITD will need strong programs to remove barriers to MBE and WBE participation as prime contractors and must continue its efforts to open subcontracting opportunities. The Department can build on past successes in developing innovative programs.

Reintroduction of the DBE contract goals program is not recommended at this time because other strategies appear to better address the disadvantages facing minority- and women-owned firms in the Idaho transportation contracting industry. This should not imply an end to ITD's efforts to build a successful minority and female contracting community. It does mean a new direction for ITD's implementation of the Federal DBE Program that will require time and resources to be successful.